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REDWOOD et al. v. ROGERS et al.

March 1, 1906.

[53 S. E. 6.]

1. Fraud — Evidence — Character of Proof.—Fraud, while provable either by positive and direct evidence or by facts and circumstances affording a conclusion of fraud, must be affirmatively proved by clear and satisfactory evidence.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 55-59.]

2. Corporations — Contracts — Ultra Vires.—Where a corporation was authorized by its charter to borrow money and to issue bonds secured by mortgage therefor, and it accordingly executed a mortgage deed of trust to secure an authorized issue of bonds of the value of \$1,000,000, but it was stipulated in the resolution authorizing the mortgage and bonds that not more than \$500,000 worth of bonds should be issue except on the written consent of two-thirds of the stockholders and of the trustee, and more than \$500,000 worth of bonds were issued without any objection being made, a subsequent issue of bonds within the \$1,000,000 limit, upon the written request of two-thirds of the stockholders and of the substituted trustee in the mortgage, for the purpose of paying debts of the company and otherwise promoting its interests, was not ultra vires.

CARLIN & CO. v. FRASER.

March 22, 1906.

[53 S. E. 145.]

1. Evidence — Writing — Prior Parol Agreements—Admissibility.—Evidence of a prior parol agreement is not admissible to vary the terms of a valid written contract, in the absence of fraud or mistake.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2030-2047.]

2. Trial — Fraud — Pleading — Instruction.—Where fraud is not pleaded, it is error to give an instruction thereon.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 587, 589.]

3. Same—Instruction.—It is misleading to give an instruction based on inadmissible evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596, 598.]

4. Same—Measure of Recovery—Set-Off.—In an action wherein defendants pleaded a set-off to plaintiff's claim, instructions as to the amount plaintiff would be entitled to recover on his claim should conclude with directions to set off the amount found due on the set-off against the amount found for plaintiff and to render verdict for the party found entitled to the balance.